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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 442.

THE RIO GUALEGUAY
FIDELITY-PHENIX FIRE INSURANCE COMPANY
OF NEW YORK,

Petitioner,

versus

FLOTA MERCANTE DEL ESTADO.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Respondent.

I. STATEMENT.

Petitioner seeks a writ on the ground that a "novel and important question of law" is presented. In fact, the question of law referred to is not novel and, so far as this case is concerned, the question is academic. The decision sought to be reviewed turned wholly on issues of fact.

There is no valid ground whatever for seeking certiorari.

This suit was brought for damage to cargo resulting from a fire aboard the SS RIO GUALEGUAY while she was lying at a dock in New Orleans on December 2, 1943. Libelant, the petitioner here, claimed to be entitled to recovery on the ground that the fire and consequent damage were caused by certain allegedly defective or unseaworthy conditions of the vessel or its equipment and that these defective conditions were within the personal design and neglect of the respondent, a foreign vessel owner. Among those allegedly defective conditions was the construction or condition of the ship's steam smothering line.

The respondent denied that the fire was due to any defective condition of the vessel or to the negligence of itself or its servants and in addition it set up in defense the Fire Statute 46 U. S. Code 182 and certain provisions of the Carriage of Goods by Sea Act, 46 U. S. Code, 1304 § 4(2). It is not true, as stated in the petition, that the respondent defended solely under the Fire Statute. The courts below found for respondent on all issues of fact.

II. THE "QUESTION OF LAW" IS ACADEMIC.

The question petitioner says is presented is whether a foreign shipowner may have the benefit of our Fire Statute if the vessel involved has been maintained "in violation of the American Safety Statute". The only alleged "violation" in this case is the condition of the steam smothering line. That question is academic because

it is based on the false assumption that the steam smothering line of the vessel was defective and that that condition resulted from respondent's "neglect" within the meaning of the Fire Statute. Petitioner first raised the point in the Court of Appeals. That Court in passing and wholly unnecessary to decision, merely noticed the point and said there was no merit in it. Surprisingly enough, petitioner now puts the question forward as a ground for review by this Court.

Neither court below held there was any violation of any American Safety Statute, but to the contrary both courts held as a fact that the vessel was not defective or unseaworthy in any of the respects alleged. In disposing of libelant's claim that the steam smothering line was defective the District Court said R. 884:

> "In addition to its contention of unseaworthiness of the wooden bulkhead as the cause of the fire, libelant also contends that the vessel was unseaworthy by reason of a defective steam smothering system and a lack of drainage in No. 2 hold. These contentions are easily disposed of by the evidence. There is no substantial proof that the steam smothering system did not operate properly. Even if it failed to operate properly, no neglect of the owner is shown because no defect in the system is shown."

On this subject the United States Court of Appeals said at p. 902:

> "* * * Although libellant criticizes the location of the steam discharge pipe as too high to effectively transmit steam to the lower hold, which might affect its efficiency, there is no evidence of *negligence* in

> either the construction or attempted use of the system which would preclude the defense afforded by 46 U. S. C. A. 182."

Petitioner's statements at page 4 of its petition that the steam smothering line was "completely inoperative" and "in any event, was so constructed as to render it totally ineffective even had it been operative" and others to like effect are wholly unjustified and as used they are very misleading. Such was its claims in the lower courts but the courts held the claims unfounded and untrue, and hence there was no violation of our safety statutes.

Furthermore, respondent pleaded and is entitled to the benefit of the United States Carriage of Goods by Sea Act, 1936. Indeed, it may rely solely on the Act in defense to the exclusion of the Fire Statute. The Carriage of Goods by Sea Act provides, in part, in Sec. 4 (2) as follows:

> "(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * *
>
> "(f) Fire, unless caused by the actual fault or privity of the carrier;"

This Act, applying to both American and foreign carriers, imposes duties and liabilities as well as giving carriers certain rights and immunities. Obviously, the Act is not conditioned upon any such requirements as petitioner suggests. No one has ever suggested it does. This is another reason why petitioner's point is academic.

III. THE "QUESTION OF LAW" IS NOT NOVEL.

The precise point said to be presented was decided in the case of *The Cabo Hatteras,* 5 F. Supp. 725. (S. D. N. Y. 1933.) In that case the court held that a foreign vessel which met all requirements of the foreign law applicable to her, was entitled to the protection of our Fire Statute although she was not equipped with a steam smothering line as required by American law. So, instead of being novel, the question has been passed on and contrary to petitioner's contention. In *The Ernie Miller,* 71 F. Supp. 806, (E. D. La. 1947), it was held that a vessel under Honduran registry was not unseaworthy in not having a certain licensed engineer, although under American law such an engineer was required to have a license.

IV. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OTHER DECISIONS.

It is also said that the decision of the Court of Appeals is in direct and specific conflict with the decision of the Court of Appeals for the Fourth Circuit in *Hines v. Butler,* 278 Fed. 877 (1921). That statement is also entirely misleading. On the fact findings in this case there could not possibly be a conflict with the decision in *Hines v. Butler.* There the court found: "* * * there was an entire lack of fire apparatus in proper condition to fight the fire, and also great lack of discipline and proper conduct on the part of the crew." The court held that those conditions were so flagrant and had existed for so long that the owner was guilty of personal design and neglect in blindly shutting its eyes to such dangerous conditions. There cannot be any conflict between that or any such

case and this decision, where the courts below have both held that there was not any defective or unseaworthy condition or any neglect whatsoever. Furthermore, the vessel involved in that case was not a foreign vessel.

At page 7 of the petition it is said the decision below is a "radical departure" from the "Rule of The Pennsylvania". That rule is limited to collision cases where one of the vessels has violated a statutory duty. It has no application here.

V. PETITIONER'S CONTENTION IF PRESENTED WOULD BE WITHOUT LEGAL BASIS OR MERIT.

Although the Fire Statute has been in effect since 1851, or for more than 100 years, no court has ever held that a foreign shipowner, to be entitled to its benefit, must comply with all our numerous so-called safety laws, including, to name but a few, such subjects as load lines, licensing, manning, watertight bulkheads and life-saving appliances. On the contrary, in *The Cabo Hatteras, supra,* the court held petitioner's contention without merit and the courts of this country, including this Court, have in innumerable cases given a foreign shipowner the benefit of that statute with the single exception, to wit, where the fire was caused by the "design or neglect" of the owner. Indeed, other countries have differing requirements, some less strict or rigorous, others possibly more. If petitioner's contention be adopted, it would follow that a large proportion of foreign ships would not comply in some respect or other, perhaps in some unimportant respect, with our statutes and so lose the benefit of our Fire Statute.

In the case of large passenger vessels, certain of our so-called safety laws do apply to them, but Congress has not attempted to make such laws applicable to all foreign ships, such as this freighter, coming to our ports. Under the foreign applicable law this vessel was not required to have any steam smothering line whatever.

The Fire Statute, by its terms, is conditioned only on the fire not being caused by the design or neglect of the owner and there is no basis for suggesting that Congress intended that a foreign shipowner was not to have the benefit of the statute unless it complied with all our so-called "safety statutes" which Congress has designedly not made applicable to them.

VI. CONCLUSION.

In conclusion, we submit the petition is wholly without merit. The so-called question is academic and its decision would not affect the result of this case; the question is not novel and in any event is without merit.

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CERTIFICATE OF COUNSEL.

The undersigned counsel for the opponents hereby certifies that copy of the foregoing brief has this day been forwarded to opposing counsel.

New York, N. Y., November .., 1953.

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